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IN THE

Supreme Court of the United States

October Term, 1965.

No. 392.

EARL L. STAGER,

Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
A Florida Corporation,

Respondent.

REPLY TO BRIEF IN OPPOSITION.

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REPLY BRIEF IN OPPOSITION.

The indirection and non-responsiveness of respondent's opposition brief forces this reply to the new matter therein contained, respecting claims that

(1) petitioner raises inadequacy of verdict for the first time here;

(2) petitioner's counsel "provoked" a mistrial and was therefore confined to testimony produced at the first trial;

(3) alleged record testimony on "experience" of road crews proved contributory negligence;

(4) the jury could have believed that petitioner was not disabled from the testimony of his own doctor.

(1) Inadequacy of Verdict.

It is time enough to speak of inadequate verdicts when one has had a fair trial. Petitioner has not raised the issue here or below. Not until petitioner is afforded due process of law, in the presentation of evidence, in testing that of the defense, and by appropriate jury instruction on the evidence, will we have a true evaluation of petitioner's financial losses.

(2) Petitioner "Provoking" Mistrial.

The brief in opposition (p. 11) advances the extraordinary contention that, after a mistrial, the petitioner is foreclosed from placing before the jury legitimate, material proof of the course of his medical history thereafter.

Respondent's contention is all the more extraordinary in that it rashly exposes yet another shabby aspect of the respondent's trial technique in glaring disregard for due process and fair play.

The "factual background" of the mistrial declared at the earlier trial was this. The negligent crewman whose failure to relay signals resulted in a "rough coupling and personal injuries" to petitioner was assessed, after railroad inquiry, with 30 demerits (R. 534-536). A railroader on respondent's line who accumulates 90 demerits is subject to discharge (R. 536-537). At both trials the trial court refused to allow respondent's letter assessing the demerits into evidence as an admission of respondent (R. 540). Though preserved in the appellate court below (vide majority opinion of the Third District Court of Appeal) this issue was not presented to this Court because it went to the existence of negligence and the jury found respondent negligent. Therefore, though petitioner was improperly deprived of an important item of proof, the verdict for the plaintiff rendered it technically moot, although it may well have had an effect on the size of the verdict: *Katila v. B. & O. R. R.*, 104 F. 2d 842, 843 (6th Cir. 1939); *Sears v. So. Pac. Co.*, 313 F. 2d 498, 502 (9th Cir. 1963); *Chicago, etc., Ry. Co. v. Kulp*, 102 F. 2d 352, 356 (1939); *Dennis v. Denver, etc., Ry. Co.*, 375 U. S. 208, 84 S. Ct. 291 (1964); *Mercer v. Theriot*, 377 U. S. 152, 84 S. Ct. 1157 (1965).

The first trial ended during the cross-examination of Hurley, the respondent's coupling foreman (R. 96, 97, 98). Hurley denied that there had been an accident. Petitioner's counsel countered that denial by asking Hurley whether or not the demerit letter referred to an accident. A mistrial

was then declared and petitioner's counsel engaged in a legitimate search for truth was fined $500.00.

Even if the demerit letter was not an admission that respondent's servant was at fault, it was surely usable to impeach Hurley. Hurley was the switching crewman whose signals were not relayed. The demerits would not have been assessed had there been no signals to be relayed. Hurley was the only person who knew that he had given signals and the only person who could, at the official railroad investigation, have informed the respondent that he had done so. Yet the trial court immediately declared a mistrial and penalized petitioner's counsel. Significantly, Hurley was not produced in person by respondent at the second trial. Cf.: *Gori v. U. S.*, 367 U. S. at 369-70, 81 S. Ct. at 1526-7.

We leave it to this Court to judge whether petitioner "provoked" a mistrial, although we do not see the materiality of this point relative to the merits of the petition. Counsel for petitioner was merely preserving the error on the record. Seemingly, the Court should consider whether the mistrial was "invoked" when petitioner's cross-examination of Hurley got too close to the bone.

While on respondent's Point Two, petitioner asks what on earth has "doctor shopping" to do with the second examination by a neutral physician appointed by the court itself?

(3) Railroaders "Experience" as Contributory Negligence.

Respondent suggests that petitioner's "whole argument" is based upon the fact that there was no rule which prevented the petitioner from boarding the train while the yard crew was engaged in switching operations" (Brief in Opposition, p. 7). Petitioner's "whole argument", rather, is that the respondent had the burden of proving contributory negligence; that it failed to prove it; and that the trial court, nevertheless, charged the jury on that unsubstantiated issue; and dismissed petitioner's demurrer on the issue of contributory negligence.

Respondent again rashly indulges in presentation of one error as a cure for another. Footnote 4 to the petition (p. 14) noted that the arbitrary action of the trial court in preventing petitioner from adducing testimony to the effect that it was customary for road crews to board incomplete trains while allowing respondent to attempt such production. Quite unabashed, respondent trots out this arbitrarily admitted evidence as proof of contributory negligence. It seems to think that the truncated excerpt from the record (R. 789), proves that railroad "engineers learn, as a matter of experience, not to board a train until it is completed by the yard crew". We fear the excerpt proves no such thing. The only mention of "experience" is in the question asked by respondent's counsel. The answer was completely non-responsive. The witness, respondent's foreman of engines and trainmaster (Mr. Robert Stack, or "Bob"—R. 1014) responded that "crews will not *take charge* of the train or the engines until the trains are completed". Petitioner never contended that he "took charge" of the train. Quite the contrary. His case was that while the train was in charge of the switching crew he was injured through the negligence of a switching crewman. There was, thus, no conflict between petitioner and his supervisor to create a submissible issue of contributory negligence—certainly not causative contributory negligence.

Respondent also forgets that the trial court, on the basis of this arbitrarily admitted testimony, instructed the jury that if they found that petitioner had no right to be on the incompleted train (to which no one testified) they should find for respondent (R. 1110). The jury manifestly rejected this invitation.

Twist and turn as it may, search the record as it will, the respondent will not find a shred of evidence to the effect that experienced railroaders shun coupling operations as dangerous. Respondent's argument throughout the trial was based on this unproved idea—that experienced railroadmen know that coupling operations are dangerous—

"all that weight moving around." Of course, all railroad operations involving movement have some element of danger in them. That is why the Congress enacted the FELA. If knowledge of the risk of railroading were to be a complete defense, few railroaders would recover under the FELA. That is why, by the 1939 Amendment, the Congress abolished the defense of assumption of risk. Because railroad counsel, as in the case at bar, continued to urge assumption of risk situations as contributory negligence this Court forbade trial courts from allowing assumption of risk to be revived under the guise of contributory negligence: *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943). This is the root of the evil. It calls out loudly for a new trial on the issue of damages alone.

Moreover, petitioner does not "act" under the assumption "that the average juror is thoroughly conversant with the legal doctrine of assumption of risk". Rather, petitioner thought he had made clear in his petition that a railroad argument sounding in assumption of risk should be squashed immediately by the trial court, or failing that, the jury should be instructed respecting the legal boundary between assumption of risk and contributory negligence, with a proper explanation of the difference between contributory negligence and assumption of risk and that assumption of risk is not a legal defense in these cases.

Finally, and here again respondent opens yet another error by the trial court, it is argued that the jury may have disbelieved Stager's testimony that he was braced for the normal jolt of coupling since the fireman was not injured.[1] Actually, there were two other crew members on the engine. Neither were injured. The brakeman, Almond, was called by petitioner and was fully cross-examined but not, as noted in the petition, on the subject of bracing. The fireman,

1. General George S. Patton, Jr., had his neck broken in an accident which only shook up the three other occupants of the car in which he was a passenger: Patton: *Ordeal and Triumph*, by Ladislas Farago, July, 1965 edition, p. 788.

Johnson, was not in the cab, but was checking the engine when the accident happened. He was called by the respondent, and asked a few innocuous questions. When petitioner sought on cross-examination to bring out all the details of the accident, the trial court anticipated its later, more harmful, error curtailing Dr. Perlmutter's testimony, by forbidding all questions beyond the scope of the direct (R. 942). Actually, on his pre-trial deposition, which is included in the record, Johnson had quite a lot to say about the effect of the accident on him. Respondent, in broaching the subject of the fireman, has apparently forgotten that Johnson's deposition is available or it assumes, perhaps, that this Court does not read the record.

Respondent has failed to demonstrate any record evidence of contributory negligence or to counter petitioner's demonstration that the contentions advanced as contributory negligence sound in assumption of risk.

(4) The Jury Could Have Believed That Petitioner Was Not Disabled From the Testimony of His Own Doctor.

Respondent seeks comfort in the testimony of Dr. Pollard, an operating neurosurgeon called as petitioner's witness. It is small comfort indeed. Dr. Pollard test fied that he did a major surgical procedure and removed a herniated disc from petitioner's back. He concluded that from the economic aspect, the effect on petitioner of his surgery was that "this man never got better enough to even make an honest try of working" (R. 853). The subsequent course of his medical history revealed additional major surgery on petitioner's back in Philadelphia by famed Dr. Henry Wycis, Professor of Neurosurgery, who concluded that petitioner would never be able to work at railroading again. All of this would have been substantiated by Dr. Perlmutter, the neutral court-appointed doctor, had the trial judge afforded due process and engaged in fair play and allowed the doctor on cross-examination by petitioner's counsel, as a railroad witness, to tell

what he actually knew up to the last minute. This is the hard core of the grave injustice done to petitioner by the strange trial rulings of this misguided trial court.

The short and crushing answer to respondent's contention, is that if his own doctor so testified to Stager's detriment, then it was all the more essential if truth and justice were to be subserved, that the totally contradicting testimony of the court-appointed doctor testifying for the railroad be brought to the attention of the jury. In any event, by asserting a lesser degree of disability than that revealed in the proffered, but excluded, testimony of the court-appointed doctor, respondent destroys the notion of the appellate court below that the excluded evidence was "cumulative" (Brief in Opposition, p. 12).

Conclusion.

This case presents nothing more than Stager's right to have a jury of his peers consider the evidence he had to support his cause; to test that adduced in defense by cross-examination; and to have the jury properly enlightened on the law applicable to the evidence. Stager asks if it is the law that an honest workman is negligent when he earns his pay by doing what he was employed to do (R. 767). He doubts whether under any other circumstances the respondent would censure him for commencing work as soon as he signed on and started to draw his pay.

Respectfully submitted,

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